IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1640

F. D. RICH COMPANY, INCORPORATED, a corporation, doing business in the State of Washington, and AMERICAN SURETY COMPANY,

Petitioners

v.

ACME GRANITE & TILE COMPANY, a Division of PIPER & GREENHALGH, INCORPORATED, a Washington Corporation; B & G CONSTRUCTORS INCORPORATED; FIREMAN'S FUND INSURANCE COMPANY; and UNITED STATES FIDELITY & GUARANTY COMPANY.

Respondents

BRIEF OF ACME GRANITE & TILE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF CROSS-PETITION FOR CERTIORARI

RALPH B. POTTS
1109 Hoge Building
Seattle, Washington 98104

Attorney for Repondents and Cross-Petitioners Acme Granite & Tile Company, a Division of Piper & Greenhalgh, Inc.

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STATEMENT OF THE CASE

In the petition of Petitioners, F. D. Rich Company and American Surety Company, the petitioners

have carefully evaded the real question at issue in this law suit. Petitioners make it appear that Piper & Greenhalgh, Inc., as a corporation, was dissolved and that, therefore, although the jury found unanimously for the plaintiff, Piper & Greenhalgh, or rather Acme Granite & Tile Company, which the records shows was a partnership, then a corporation, then a partnership, and finally called a division of Piper & Greenhalgh, the trial court held plaintiff had no more standing in court because its corporate rights had been dissolved.

But, why was the corporation dissolved? The United States Court of Appeals for the Ninth Circuit in its opinion on Page 3, Petitioner's Appendix 1a, stated:

> "Because of defective framing by B & G the Army inspector revoked his approval of certain houses on which Acme was working. The framing was out of plumb and not parallel. An engineer rejected some 50 units and warned Acme that further plastering over defective framing would meet with similar rejection.
>
> Protest by Acme to Rich resulted in conferences and exchange of letters. The quality of B & G's corrective measure was in dispute. An empasse developed and Acme refused to proceed. On March 11, Rich declared Acme in default and employed Sunset Tile Company to finish the work. A new Corps of Engineers' inspector was appointed to replace the engineer who had found fault with B & G's work. There were no more work stoppages.
>
> *Following Rich's termination of Acme's subcontract, Acme was ultimately forced into Bankruptcy and liquidation.*"

The testimony in this case, just on the liability issue alone, is in some 34 volumes. It certainly must be undisputed in any way by petitioners, that B &

G's framing was out of plumb and not parallel and when Acme came to put on this defective framing the plastering and the tile, 50 units were immediately rejected by the inspector for the Corps of Engineers and Acme was warned that if it put on any more plaster or tile on this defective framing that Acme's work would be rejected because it was put on over defective framing. It is noted that the Appeals Court stated:

> "A new Corps of Engineers' inspector was appointed to replace the engineer who had found fault with B & G's work. There were no more work stoppages."

However, the new contractor who replaced Acme after Acme's contract was terminated by F. D. Rich, on direction of B & G and Rich, in an endeavor to even up defective framing, put on the plaster so thick that it began to rot and although it was accepted by the new inspector, it was fraud on the Government. The man who testified to this was the new plasterer obtained by Rich, so there can't be any question about the fraud upon the Government brought about by Rich and B & G who tried by every means to make Acme go ahead and not only put on its plaster and tile over defective framing, but correct B & G's defective framing itself. This forced Acme, heretofore successful in doing this kind of work for many years, into bankruptcy, as the Court of Appeals stated. This bankruptcy brought about the dissolution of the corporation. Rich kept the $57,000 of Acme's work and materials for which a claim was made under the Miller and Capehart Acts, and never denied.

Because of the termination of Acme's contract by Rich, Acme could get no more invitations to bid

from other prime contractors, lost its experienced crews and superintendents that had been with them for many years, and had to buy up a lease on a warehouse that cost them $10,000, (the check was introduced into evidence) and this law suit was all they had left. The dissolution itself was made by Acme's original attorney, Leslie Cooper, of Everett, who with the accountant decided this was the thing to do to salvage what little they could. Trial counsel, the author of this brief, did not know of this dissolution until he received Rich's post-trial motion for dismissal and abatement of the action. (See Stipulation proposed by counsel for Rich on Page 18 of the Special Transcript of Testimony taken on January 12, 1967, as follows:

> "Ralph B. Potts, attorney for plaintiff, was not informed concerning the actual dissolution of Piper & Greenhalgh until he received Rich's post-trial motion for dismissal and abatement of the action.")

The Cross-Petition of Acme in this court will show the injustice, including a claim of fraud, made by attorney for Rich, against Greenhalgh and Piper and the fury and wrath of the trial court, who believed the bare statement in an affidavit of Rich White, attorney for F. D. Rich, to the effect of the fraud. There was not a bit of evidence ever produced showing any fraud of any kind, except the statement of counsel in this affidavit. What resulted took on the form of a criminal prosecution and contempt citations were made against Piper and Greenhalgh personally.

Counsel for Rich very cleverly worked on this fraud angle because he knew that if the real truth became known to the court that his client would suf-

fer and so in his brief to the Court of Appeals on Page 23, he states:

> "Should this court consider the matter of substitution to be of equitable cognizance, the denial of substitution should be affirmed on the ground that Piper and Greenhalgh should not profit by their own fraud."

The fraud counsel complains of was the most absurd thing ever put down on legal paper. That was, that after the dissolution of the corporation, unknown by trials attorney, as counsel for Rich himself stipulated, the author of this brief made motions and other pleadings which were entitled by the author as originally, that is to say: "United States of America for the Use of Acme Granite & Tile Company" and "Piper & Greenhalgh, a Washington corporation." This was the henious fraud and yet the court went along with it. But, the author of this brief earnestly petitions this Honorable Court to read his Cross-Petition for Certiorari which will set out this matter cogently and fully, although briefly.

Counsel for Rich asks in his brief to appellant court should Piper and Greenhalgh profit by their own fraud? More reasonably, it seems to the author of this brief that the same question should be asked of Rich. Should Rich & Company, who brought about the bankruptcy of Acme, now profit by its fraud, fraud that no court or reasonable jury could possibly ignore? That jury unanimously found for Acme—52 pictures introduced into evidence; the testimony of two disinterested architects; the testimony of Rich's own superintendents, and the testimony of the honest inspector for the Corps of Engineers, Gil Cunningham, showed the bad framing. Yet, in spite of all this, clever counsel for Rich got

the trial court to set aside the jury's verdict on liability and entered a judgment n.o.v. giving judgment to Rich against Acme and the bonding company bonding Acme, Fireman's Fund.

In all the cases cited by Rich there is no case, not a single one, that deals with this situation. Is there no equity left in the opinions of this Honorable Court? The author of this brief believes that counsel for Rich fears that there might be.

But, since all distinctions between law and equity have been abolished, let us look with good common sense, at the law as it is and should be.

But, before we go into that, the author of this brief would like to call to the attention of the court that after terminating Acme's contract and hiring Sunset to finish the job, Rich, in spite of the fact that it had signed a contract with Acme and that contract was secured by a good and sufficient surety bond, got the Corps of Engineers to re-open the contract on the specious ground that the contract had never been formalized and got another $77,000 out of the Government—$77,000 or more for the plaster and tile work, the exact amount may never be known.

ARGUMENT

Acme does not claim that the dissolved corporation could have proceeded further to recover its loss against Rich as a corporation (the corporate laws of the State of Washington were amended the year following prolonging the life of a corporation to settle such matters), but counsel for Rich has cited no case which shows that in law and equity the real parties in interest, Greenhalgh and Piper, should not be substituted as a party plaintiff in the action.

Between them Piper and Greenhalgh owned all of the stock of the dissolved corporation and, as above mentioned, were partners before they formed the corporation and actually the contract with Rich itself was taken in the name of Acme Granite & Tile Company (Exhibit No. 3), not as a division of Piper & Greenhalgh, but simply as Acme Granite & Tile, signed by Greenhalgh.

Counsel for Rich cites several cases which mention that a corporation dissolution abates the corporation the same as a death abates the deceased's right to personally bring an action, but in those few cases mentioned there was always a personal representative to proceed with the necessary litigation to protect the estate.

As the Court of Appeals said on Page 4a of Appendix 1a:

> "Were it not for such a power of substitution valuable property rights involved in litigation could simply disappear. Such a result would be at odds with both common sense and state law."

Acme and Fireman's Fund, surety for Acme, have both cited many cases where the dissolution of a corporate entity did not relieve the corporation's assets or the stockholders who received them, from liability to creditors.

In all justice and law, why shouldn't the stockholders, the real parties in interest, recover damages from the corporation's debtors, especially when the debtors bankrupted the corporation.

A chose in action is property under the Washington laws, and property is not abolished by the dissolution of a corporation. There are many cases where creditors of a corporation which was dissolved were held to have an interest in the assets of the dis-

solved corporation. If this is true and there would seem to be no argument about it, then why shouldn't the reverse be true—that the real parties in interest, the two and only stockholders of the dissolved corporation have the right to collect from a creditor of the corporation such as F. D. Rich Company what rightfully belonged to the corporation before it was dissolved, that is the chose of action, and have the right to pursue the chose of action to judgment?

The Supreme Court of the State of Washington held in *Columbia Building Company v. National Surety Company,* 194 Wash. 51, 76 P. 2d 1027, that an action survived involving a dissolved corporation through the substitution of the one into whose hands the assets of the corporation passed. In that case the assets of the corporation were transferred to the State Insurance Commissioner and the court held specifically that the Insurance Commissioner could be substituted for the corporation.

In the case of *Mayflower Realty Co. v. Security Savings & Loan Society* 192 Wash. 192, 72 P.2d 1038, the Washington State Supreme Court said:

> "It is well settled that if the dissolution of a corporation is voluntary and it elects to take advantage of the option given it by law to terminate the existence of the corporation, the dissolution is due to its act and the corporation remains liable for its outstanding contracts."

The dissolution in that case was held to have had no effect except to require the substitution of one having a standing to maintain the action.

In a later case, *State ex rel Everett Trust & Savings Bank v. Pacific Wax Paper Company,* 22 Wn. 2d 884, 157 P.2d 707, the Washington Supreme Court said:

> ". . . The rule seems to be that, when a corporation is dissolved by its voluntary act, the corporation remains bound by its outstanding executory contracts."

So, certainly the reverse should be true and as in this case, the wrong doer, who has damaged the corporation that was voluntarily dissolved, should be held for such damages by the substitution of someone having standing in court for the dissolved corporation.

The Federal Rule (Federal Rule 25c) expressly contemplates a substitution of one having standing in court for one who lacks it.

There are a lot of other cases similar to this one and it would be laboring the point to cite more of them.

The petitioner has cited many cases, all of which have been examined by the author of this brief and there is not one of them that goes to the question of the right of a proper party to be substituted for the dissolved corporation in action pending when the corporation was dissolved. All of the cases simply hold that when a corporation is abated it ceases to be an entity and cannot maintain an action in the courts. None of these cases go further in a situation of this kind and hold that the proper party, such as the main parties in interest, could not be subsituted and proceed with the cause of action, and certainly none of the cases cited by petitioner go into the equity of the situation. Certainly this Honorable Court is not going to permit this petitioner, who brought about the dissolution of the plaintiff corporation, to get out scott free for its fraud and illegal breach of its contract with Acme because of such a technicality, and not only that, but have a

windfall of some $57,000 which F. D. Rich owed Acme for labor and materials on its last progress payment which it refused to pay and now holds in its possession. And, this $57,000 is but a small part of the damages Acme sustained.

In its second opinion, the Appeals Court stated:

> "There is no conflict between our opinion and the substantive law of the State of Washington. There is some Federal case authority prior to 1938, when the Conformity Acts were still in force, which supports the petitioner's view that certain local procedural laws apply in the District Court. See *Oklahoma Gas Company v. Oklahoma*, 273 U.S. 257, 259-60 (1927) (dictum); *United States v. Spokane Mill Company*, 206 F. 999 (1913). These cases have been rendered obsolete by the adoption of the Federal Rules of Specific Procedure."

If the Federal Courts do not have the power to correct grave injustices, such as are in this case, in a case tried in the Federal District Court, then the growth of the law has not only ceased but taken a back flip. "Equity will not suffer a wrong to be without a remedy." *Ballantine's Law Dictionary*, Page 414.

In one of the cases cited by petitioner, that of *Defense Corporation v. Lawrence Company*, 336 U.S. 639, this court said:

> ". . . Our supervisory Appellate jurisdiction would be of little value if the injustice caused by the decision below were to stand uncorrected. We are not so constricted. The Clauseen case, supra, indicates that and *Walling v. Reuter, Inc.* 321 J. S. 671, 676 and cases cited, is conclusive against respondent's argument."

In addition to the above, as stated in 47 A.L.R. 1355, the rule in the American States is:

> "When a business corporation instituted for the purposes of gain or private interest, is dissolved, the modern doctrine is that its property, after payment of its debts, equitably belongs to its stockholders."

In the case at bar the entire stock of the dissolved corporation was owned by Val Greenhalgh and George Piper and, therefore, they had a right to be substituted for the abated corporation under this theory of the law and in all justice and equity.

A.L.R. goes on to say:

> "The dissolution of a corporation cannot deprive its creditors or stockholders of their rights in its property; and if the common law affords them no adequate remedy, they may obtain relief in equity.
>
> Under the modern rule of equity jurisprudence the severity of the common law in this respect is greatly mitigated and it is held that it is the franchise and not the property of the corporation that is forfeited by a judgment of ouster and that the property of the corporation is a trust fund for the payment of debts and distribution among stockholders.
>
> Nothing is better settled than the assets of an insolvent corporation are a fund for the payment of its debts. The holders of such property take it charged with a trust in favor of such creditors which a court of equity will enforce. A court, which never allows a trust to fail for want of a Trustee, will see to the execution of that trust although by the dissolution of the corporation the legal title to its property has been changed."

The equity aspect of this case has not been touched upon by the petitioner but this is a case where the equity aspect should be considered by this court if the matter is heard on its merits. Other-

wise, here we have a litigant reversed by the Apellate Court, who made two opinions on the matter, attempting by a legal technicality, none too strong at its very best, to get rid of its own wrongs with which it is charged by the Respondent-Cross Petitioner herein, and to go hence with some $57,000 which was taken from the respondent, although a legal claim was made by respondent under the Capehart and Miller Acts, which claim has never been contested by petitioner. Unjust enrichment would be too mild a title for such a disposition of a law suit. And, not only that, who committed the fraud, in fact, a series of frauds?—(1) In conspiracy with B & G trying to force respondent to continue putting its plaster and tile upon defective framing put up by B & G already condemned by the Government inspector and the Government inspector having warned respondent not to put any further plaster or tile on the defective framing or he would reject all of the work and B & G and petitioner trying to force respondent to not only put on its own work but to correct the defective framing of B & G as well; (2) forcing the respondent into bankruptcy by reason of the unjustified termination of respondent's contract.

Petitioner has not shown any cause or reasons for the issuance of a Writ of Certiorari

In its petition for a Writ of Certiorari, petitioner tries to make it appear that there is a conflict between the decisions of the different Court of Appeals and that the decision of the Court of Appeals in this case, in directing the substitution of shareholders for the dissolved corporation in an action which abated under applicable Washington law, is in direct conflict with decisions of this court in *Oklahoma National Gas Company v. Oklahoma*, etc., supra. With

regard to the last point all of these cases cited by the petitioner were as the Court of Appeals pointed out in its second opinion, made prior to the adoption of the Federal Rules of Specific Procedure.

With regard to the second point, there is no conflict between the decisions of the different Circuit Court of Appeals because none of these cases are directly in point with the case at bar and none of them are directly in conflict with each other. Each case pointed out on Page 7, Paragraph 2 of petitioner's reasons for granting the writ, are different in fact and legal effect than the other. It would be impossible to say that there was a direct conflict between these different Court of Appeals cases with regard to the law which should be applicable in this case.

With regard to petitioner's points three and four, in number three, the petitioner contends that the decision of the Court of Appeals disregards the controlling decisions of the Supreme Court of the State of Washington and cites one of the cases, in fact, two of them, wherein the assets of the abated corporation was held for creditors and other interested parties quite contrary to its contention and which, as the Court of Appeals stated in its first opinion, i.e.

> "Were it not for such a power of subsitution valuable property rights involved in litigation could simply disappear. Such a result would be at odds with both common sense and state law."

In its point number four, petitioner says to this court:

> "Such a decision if allowed to stand would permit encroachment by the Federal judiciary, through court rules, on a matter exclusively within the province of the state which brought the corporation into being."

It is such unreasonable, technical interpretations that clever counsel for petitioner has used all through the different trial of this case, beginning way back in 1963, to confuse the trial court and after all the expense, the bankruptcy to the plaintiff corporation, the contempt proceedings against Greenhalgh and Piper, that threatens to take away respondent's last chance for justice and allow the wrong doer to escape with $57,000 of the respondent's money in its pocket and freedom from the claim for damages which amounts to several hundred thousand.

Moreover, this was a case tried in the Federal Court, and not in the State court and the justice and equity of the Federal Courts should be available to correct a series of injustices that have almost wrecked the lives of two men and taken away their life savings.

The respondent's Cross-Petition will show to this court a sample of the fraudulent conduct of F. D. Rich Company and its attorney, Rich White. We know this court is far removed from the battle stances of parties in litigation, but perhaps once in a while this highest court of the land should look down and see what does happen sometimes in the lower Federal Courts and perhaps to correct some of these injustices. Nowhere can an injustice of a trial of a case in a Federal District Court be better illustrated than in the Cross-Petition of the respondent herein.

Wherefore, respondents and cross-petitioners

earnestly request that the Petition of F. D. Rich Company for Writ of Certiorari be denied and that the Cross-Petition of respondents be granted.

Respectfully submitted,

RALPH B. POTTS
Attorney for Respondents,
Acme Granite & Tile Company